

SERVED: May 17, 1994

NTSB Order No. EA-4169

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of May, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-11629
v.)	SE-11630
)	
PETER BRENT SMITH and)	
CHARLES LEE WRIGHT,)	
)	
Respondents.)	

OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on December 19, 1991, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending

¹The initial decision, an excerpt from the hearing transcript, is attached. Exhibit A-1A (a large diagram of the airport) and Exhibit A-2, the cassette recording of the tower communications, were not forwarded to the Board by the parties. These items are not necessary to our decision.

respondent Smith's airline transport pilot (ATP) certificate for 90 days and suspending respondent Wright's ATP certificate for 60 days. Both respondents were charged with violating, and found by the law judge to have violated, 14 C.F.R. 91.65(a), 91.87(h), and 91.9.² We grant the appeal in part.

Respondents Smith and Wright were pilot-in-command and first officer, respectively, of a Beech 1900C being operated as Brockway Air passenger-carrying Flight 993, in Part 135 service from Massena, NY, to Syracuse, NY.³ Respondent Wright was

²§ 91.65(a) (now 91.111(a)), Operating near other aircraft, provided:

No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

§ 91.87(h) (now 91.129(h)) read:

Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC [air traffic control]. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

§ 91.9(a) (now 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Rule references in the text are to the rule numbers set forth in the order of suspension, rather than the rules as currently numbered.

³The aircraft had a scheduled intermediate stop at Ogdensburg, NY, but executed two missed approaches there because of inclement weather and, rather than landing, continued on to

operating the aircraft at all relevant times. After landing on runway 28, respondents were directed by local control at Syracuse to "turn right when able ground point seven leaving the runway."⁴

Exhibit A-3 at 12:16:43.⁵ Respondents were familiar with the airport, and taxied off the runway onto diagonal taxiway E, the most direct route to the terminal area and the Brockway gate, intersecting only one taxiway, taxiway A. On reaching E, respondents were traveling at approximately 30-35 knots. All the aircraft's lights were on, except possibly the landing lights. Tr. Vol. III at 546. When respondents reached the hold short line on taxiway E (approximately 2/3 down the approximately 450-foot taxiway, see Exhibit R-6 and Tr. Vol. II at 29), they contacted ground control, stating "Ground Brockway nine ninety three off," indicating that the Beech had landed and was off the runway. Exhibit A-3 at 12:16:56. At this point, the aircraft was traveling at approximately 10 miles per hour and slowing. Tr. Vol. III at 556. Almost immediately thereafter, ground control advised respondents to "hold short of alpha give way to the Mitsubishi then taxi to the ramp via echo the inner one." Exhibit A-3 at 12:17:00.⁶

(..continued)
Syracuse. Tr. Vol. III at 539.

⁴"Ground point seven" referred to the ground controller's radio frequency (to which the aircraft would switch).

⁵Actual time 7:16:38 A.M.

⁶Three tower transcripts -- Exhibits A-3, A-4, and R-3 -- were introduced. The latter two are abbreviated versions containing only pertinent transmissions. There are transmission time errors in all three documents. Not only are there

During the end of that message, the emergency locator transmitter sounded. The aircraft had been hit by the Mitsubishi. The smaller, lighter Mitsubishi MU2 had been proceeding east up taxiway A (a long taxiway parallel to runway 28), pursuant to a clearance given it by ground control at 12:15:11. Because their radios were on different frequencies at the time, neither the Beech nor the Mitsubishi had heard each other's transmissions. The Mitsubishi's right engine embedded itself in the left side of the forward baggage compartment of the Beech. Both aircraft came to rest 33 feet east of the intersection. Exhibit R-10 B.

In brief, it was the Administrator's position at the hearing that respondents were required to hold short of the intersection of taxiways E and A and obtain ground control clearance to continue, i.e., to proceed across taxiway A. The Administrator further contended that respondents had a primary "see and avoid" responsibility. Respondents testified that they were given, by local control, a clearance on taxiway E and that they were doing nothing more than following taxiway E to the terminal.

Respondents stated that they contacted ground control, as

(..continued)

inconsistencies between the Administrator's and respondents' transcripts., there are inconsistencies between the Administrator's two exhibits. For example, A-3 indicates that respondents transmitted their "leaving the runway" message at 1216:53, while A-4 lists that time at 1216:56. No explanation for the discrepancies was provided. We use Exhibit A-3 here, as the most complete document although even it, inexplicably, does not transcribe the sound made by the emergency locator transmitter. No inference as to its accuracy should be drawn. The few second time differences are not critical.

required, when the aircraft crossed taxiway E's hold short position, but that ground control's direction to hold short came too late.⁷ Respondents further testified that they had scanned for other aircraft, but did not see the Mitsubishi until it was upon them.⁸

The law judge held that, although weather was a factor, respondents should have awaited a further clearance from ATC after exiting runway 28 or should have sought instructions prior to entering the intersection. Tr. Vol. III at 736. The law judge accepted the testimony of an ATC witness for the Administrator that he knew "of no airport of any size where an aircraft can be told to taxi off a runway and go uninhibited all the way down the length of that taxiway which goes to other intersecting taxiways." Id.

On appeal, respondents contend that their conduct met the standard to which they are properly held: that of careful and

⁷The Administrator suggests that respondents' failure to receive the hold short instruction on time is a result of respondents' delay in contacting ground control. The parties appear to attach considerable weight to whether the radio contact should be made after the rear of the aircraft clears the runway or after it clears the hold short line on the taxiway. We need not resolve this debate, although there is merit to respondents' contention that crossing the hold short line is intended to ensure that the aircraft's electronics do not interfere with the airport's instrument landing system. We also need not decide whether taxiway E is, as respondents argue, a high speed taxiway or at what speed the Mitsubishi was traveling.

⁸In closing, the Administrator contended that respondents simply misheard the clearance, and believed they were cleared to the terminal. (That theory would be supported by respondent's written statements, see Exhibit A-8.) The law judge, however, made no such finding, nor did he make any credibility findings for or against respondents.

prudent pilots, and that the law judge erred in failing so to find.⁹ Respondents further argue that no violations of the regulations were proven and that actions of ATC should be found to mitigate any sanction.¹⁰ As discussed below, we reverse the finding that § 91.87(h) was violated, but affirm the § 91.65(a) and 91.9 findings.

§ 91.87(h). In asserting the § 91.87(h) claim, the Administrator argues that respondents received no clearance to proceed into the intersection of taxiways A and E and were required to seek one and await further instructions from ground control before entering that intersection. Thus, the violation of 91.87(h) is predicated on the existence, at the time of the offense, of a regulatory requirement to seek further clearance before crossing taxiway A. But the Administrator offers no pre-existing regulatory language for such a requirement. Hence, the Administrator's position, if it is to be sustained, must be based on the authority to announce and adopt regulatory interpretations through the medium of adjudications, and on the fact that this agency is bound by the validly adopted policy choices of FAA. Although the argument was not made by the Administrator, we have, therefore, considered our obligation under the FAA Civil Penalty

⁹The Administrator agrees that this is the standard to be applied.

¹⁰Respondents also argue that ATC and the Mitsubishi's pilot caused the accident and that "there can be no finding that the Brockway crew caused the accident." The law judge made no such finding, nor is one necessary to address the regulations cited by the Administrator.

Administrative Assessment Act of 1992, P.L. No. 102-345, to defer to the Administrator's validly adopted interpretive decisions. We are also mindful of the fact that litigation-based pronouncements without prior publication, documentation, or notice are the least likely interpretations to receive automatic approval. See Administrator v. Krachen, NTSB Order EA-4002 (1993).

The litigation position the Administrator takes -- that respondents knew or should have known they needed an additional clearance¹¹ -- was anything but clear or obvious at the time, even to the FAA. As a direct result of this accident, both the local and ground controllers were "decertified" for 5 days, and required to participate in "retraining." They were cited for failing to maintain proper communications and coordination, and failing to scan adequately the airport area. Initially, at least one FAA unit appears to have believed that the clearance to land, if it did not in fact authorize respondents' actions, at minimum failed to provide the aircraft separation with which ATC is charged.¹² Although the adverse action against one or both of the controllers apparently was reversed to reflect a "non-

¹¹Local control authorized respondents to use any right turn taxiway and to contact ground after leaving the runway. The first part of this instruction, therefore, authorized use of taxiway E, which ran directly to the Brockway gate and was the usual route to the terminal.

¹²Syracuse was advised by another arm of the FAA that, in its eastern region, clearance to land was clearance to operate on "all portions of the movement area" [which included the relevant taxiway]. Tr. Vol. I at 134. See also Exhibit A-6.

occurrence" on this date (see Exhibit A-6), the FAA's initial assessment that ATC should have handled the aircraft differently is not easily reconciled with its current position that ATC was blameless in this accident and that the respondents should have known to obtain a further clearance before crossing taxiway A.

Further undermining the deference the Administrator's argument is due, he offers no documentary evidence on which to conclude that respondents should have obtained or awaited further instructions before crossing the intersection, and the opinion testimony is conflicting, with respondent's expert disagreeing with the Administrator as to what is required, expected, or anticipated as a matter of custom. We note that § 91.87(h)'s language (e.g., "clearance to 'taxi to' any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point") contains no instruction regarding taxiways. See also Exhibit R-5 Airman's Information Manual (AIM) excerpt, ¶ 241, Taxiing, which also speaks only of clearances to taxi across runways, and ¶ 243. And, perhaps significantly, the AIM, which at the time of the incident contained no specific, relevant guidance, has since been changed specifically to prohibit the action taken by respondents. We take official notice of Section 4-70, which now provides:

4-70. Exiting the Runway after Landing

The following procedures should be followed after landing and reaching taxi speed.

a. Exit the runway without delay at the first available taxiway or on a taxiway as instructed by air

traffic control (ATC).

b. Taxi clear of the runway unless otherwise directed by ATC. In the absence of ATC instructions the pilot is expected to taxi clear of the landing runway even if that requires the aircraft to protrude into or cross another taxiway, runway, or ramp area. This does not authorize an aircraft to cross a subsequent taxiway/runway/ramp after clearing the landing runway.

* * * * *

d. Stop the aircraft after clearing the runway if instructions have not been received from ATC.

e. Immediately change to ground control frequency when advised by the tower and obtain a taxi clearance. (Emphasis added.)

The lack of such detailed information in the AIM, and the FAA's decision to add it some time subsequent to this event further undermine both the opinion testimony of the Administrator's witnesses that, at the time, respondents should have known to hold short of the intersection and the legal conclusion that a regulatory requirement existed.¹³

As should be clear, the Administrator's interpretation here of § 91.87(h) is not supported directly in the words of the regulation. Further, the only information before us on the subject indicates that the FAA has taken inconsistent positions as to whether the violation here was respondents' or ATC's. Accordingly we do not find the Administrator's interpretation entitled to deference in our deliberations. In the absence of

¹³There is also conflicting testimony in the record regarding whether clearances at Syracuse now direct landing aircraft to hold short at taxiway A. Respondents allege that they do.

such deference, we do not believe a violation of 91.87(h) has been established.

§ 91.65(a). This regulation is a general prohibition against operating too close to other aircraft. Especially relevant to our analysis of § 91.65(a) in this case are two of our prior decisions: Administrator v. Ferguson, 1 NTSB 328 (1968); and Administrator v. Richey, 2 NTSB 734 (1974), both of which address the see and avoid responsibility at the core of § 91.65(a).

In Ferguson, we reiterated the pilot's duty to keep a proper lookout, a duty not avoided due to limited cockpit vision caused by the construction of the aircraft.¹⁴ We, however, declined to affirm the Administrator's order because we found that respondent had taken reasonable precautions to ensure safe operation. In Richey, we noted that a violation of § 91.65(a) did not require an intentional act; the act can be unintentional if it is attributable to carelessness rather than to some other cause. Thus, we see the pertinent inquiry here as whether respondents took all prudent actions.¹⁵ The law judge's discussion indicates his belief that they did not. We must agree.

Assuming the weather was causing visibility problems on the ground, Ferguson is especially apt. Respondents were obliged,

¹⁴We held that "[w]here such a situation exists, the respondent is under a duty to take measures to compensate for such a restricted vision" 1 NTSB at 330.

¹⁵Respondents agree that this is the proper standard to be applied to their actions. Appeal at 14.

under a reasonable man standard, to "take measures to compensate." Id. at 330. We cannot find that they did so. As the aircraft approached the intersection, respondents slowed but did not stop. This we cannot say was careful behavior, when respondents knew the airport, knew the relationship of Taxiway A to operations there, and, according to their testimony, had restricted vision due to ground fog. The general "see and avoid" obligation on all pilots requires more vigilance from both aircraft.¹⁶ Overall, the record here will not support a conclusion that respondents, co-pilot and non-flying pilot in command, took all reasonable and prudent actions to avoid this collision.

§ 91.9. It is well established that violation of an operating regulation carries with it a residual violation of § 91.9. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there. Accordingly, we affirm the law judge's § 91.9 finding.

Sanction. Having dismissed the § 91.87(h) charge, we must consider this dismissal's effect on sanction. Furthermore, we find mitigating factors in respondents' favor. ATC could have

¹⁶This discussion gives respondents the benefit of the doubt regarding the degree to which fog and drizzle impaired their vision. There is, however, considerable evidence suggesting visibility was not as impaired as they suggest, such as that controllers in the tower, quite some distance away, testified that they saw the accident clearly, and respondent Smith's testimony that, on landing, the runway visual range was 3000-3500 feet (Tr. Vol III at 554). See also id. at 619 (respondent Wright's testimony interpreted to mean that fog didn't obscure their sight of the intersection).

taken preventive, cautionary action and advised either or both aircraft of the other's location. Ground control was aware of both, and the relative location of each as they moved closer to one another. Tr. Vol. II at 22 (respondents were on taxiway E while ground control had the Mitsubishi in sight; "I observed Brockway continue his taxi inbound on Echo and run into the MU2 eastbound on Alpha."). Ground control had, in fact, advised the Mitsubishi of a Northwest Airlines' aircraft coming from the opposite direction as the Beech, and the MU2 pilot was scanning for it. Tr. Vol. I at 58-58.¹⁷ However, coordination between local and ground control never occurred and, consequently, no advisory was given to either accident aircraft regarding their proximity and intersecting paths.

It is our considered opinion that, given the mitigating factors discussed here and dismissal of the § 91.87(h) charge, appropriate suspension periods would be 30 days for each respondent. In imposing an identical sanction on the first officer as on the pilot-in-command, we take into account that the first officer was controlling the aircraft and also was responsible for communication with ATC.

¹⁷It also is difficult to credit the Administrator's claim that ATC need have done nothing different when ground control did advise respondents of the other aircraft. Obviously, then, the issue is not simply whether advice should have been given, but how soon it should have been given.

The Mitsubishi pilot acknowledged that, as between his aircraft and the Beech, the Beech had the right of way in the intersection. Tr. Vol. I at 67. He, also, testified that he did not see the other aircraft until it was too late to stop.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is granted in part;
2. The initial decision is modified as set forth in this opinion; and
3. The 30-day suspension of respondents' airline transport pilot certificates shall begin 30 days from the date of service of this order.¹⁸

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁸For the purposes of this order, respondents must physically surrender their certificates to an appropriate representative of the FAA pursuant to 14 C.F.R. 61.19(f).